

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

JAMES WILLIAM GATES,)	
)	CASE NO. C14-1445-RAJ
Plaintiff,)	
)	
v.)	
)	ORDER RE: SOCIAL SECURITY
CAROLYN W. COLVIN, Acting)	DISABILITY APPEAL
Commissioner of Social Security,)	
)	
Defendant.)	
_____)	

Plaintiff James Gates proceeds through counsel in his appeal of a final decision of the Commissioner of the Social Security Administration (Commissioner). The Commissioner denied Plaintiff's application for Disability Insurance Benefits (DIB) after a hearing before an Administrative Law Judge (ALJ). Having considered the ALJ's decision, the administrative record (AR), and all memoranda of record, this matter is AFFIRMED.

FACTS AND PROCEDURAL HISTORY

Plaintiff was born on XXXX, 1971.¹ He completed high school and attended college

¹ Plaintiff's date of birth is redacted back to the year of birth in accordance with Federal Rule of Civil Procedure 5.2(a) and the General Order of the Court regarding Public Access to Electronic Case Files, pursuant to the official policy on privacy adopted by the Judicial Conference of the United States.

01 for one semester. (AR 90.) He most recently worked a waiter and a restaurant host. (AR 83.)

02 Plaintiff applied for DIB on February 28, 2009. (AR 119.) That application was
03 denied initially and on reconsideration. (AR 156, 167). Plaintiff timely requested a hearing.
04 (AR 173-75.)

05 On March 10, 2011, ALJ Verrell Dethloff held a hearing in Seattle, WA, taking
06 testimony from Plaintiff and his mother. (AR 5-79.) On March 30, 2011, the ALJ issued a
07 decision finding Plaintiff not disabled. (AR 123-55.) Plaintiff timely appealed. The Appeals
08 Council vacated the decision and remanded the case to an ALJ for further proceedings to
09 resolve issues concerning the specificity of the Residual Functional Capacity (RFC) and the
10 failure to take testimony from a Vocational Expert (VE). (AR 142-54.)

11 ALJ Dethloff conducted a second hearing on November 9, 2012. (AR 81-118.) At
12 that time, he heard testimony from Plaintiff, Plaintiff's mother and a VE. (AR 81-118.) On
13 November 23, 2012, the ALJ again issued a decision finding Plaintiff not disabled. (AR 17-
14 38.) The Appeals Council denied Plaintiff's request for review on July 21, 2015 (AR 3-8),
15 making the ALJ's decision the final decision of the Commissioner. Plaintiff appealed this
16 final decision of the Commissioner to this Court.

17 **JURISDICTION**

18 The Court has jurisdiction to review the ALJ's decision pursuant to 42 U.S.C. §
19 405(g).

20 **DISCUSSION**

21 The Commissioner follows a five-step sequential evaluation process for determining
22 whether a claimant is disabled. *See* 20 C.F.R. §§ 404.1520, 416.920 (2000). At step one, it

01 must be determined whether the claimant is gainfully employed. The ALJ found that Plaintiff
02 had not engaged in substantial gainful activity since December 31, 2007, the alleged onset
03 date. (AR 20.) At step two, it must be determined whether a claimant suffers from a severe
04 impairment. The ALJ found Plaintiff's degenerative disc disease, status-post laminectomy,
05 "pain disorder," depressive disorder, and anxiety disorder to be severe impairments. (AR 20.)
06 Step three asks whether a claimant's impairments meet or equal a listed impairment. The ALJ
07 found that Plaintiff's impairments did not meet or equal the criteria of a listed impairment.
08 (AR 21-22.)

09 If a claimant's impairments do not meet or equal a listing, the Commissioner must
10 assess RFC and determine at step four whether the claimant has demonstrated an inability to
11 perform past relevant work. The ALJ found Plaintiff capable of performing light work, with
12 the following exertional limitations: he can lift and/or carry 20 pounds occasionally and 10
13 pounds frequently; sit, stand or walk six of eight hours; occasionally stoop and climb ropes,
14 ladders, and scaffolds. (AR 22.) The ALJ also found that Plaintiff was capable of simple and
15 some detailed tasks up to four to five steps. He could have interaction with supervisors and
16 up to five co-workers, and perform non-collaborative work in a larger population. (AR 22.)
17 He could interact with the general public "only in superficial social roles." (AR 22.) With
18 that assessment, the ALJ found Plaintiff able to perform his past relevant work as a bartender
19 and waiter. (AR 35.) Based on VE testimony, the ALJ also found Plaintiff capable of the
20 representative occupations of production line solderer, hotel/motel housekeeper, semi-
21 conductor dye loader, and table worker. (AR 36.) As a result, Plaintiff was not disabled.
22 (AR 36-38.)

01 This Court's review of the ALJ's decision is limited to whether the decision is in
02 accordance with the law and the findings supported by substantial evidence in the record as a
03 whole. *See Penny v. Sullivan*, 2 F.3d 953, 956 (9th Cir. 1993). Substantial evidence means
04 more than a scintilla, but less than a preponderance; it means such relevant evidence as a
05 reasonable mind might accept as adequate to support a conclusion. *Magallanes v. Bowen*, 881
06 F.2d 747, 750 (9th Cir. 1989). If there is more than one rational interpretation, one of which
07 supports the ALJ's decision, the Court must uphold that decision. *Thomas v. Barnhart*, 278
08 F.3d 947, 954 (9th Cir. 2002).

09 Plaintiff contends that the ALJ (1) improperly rejected medical opinion evidence, (2)
10 failed to provide germane reasons to reject the lay testimony of Plaintiff's mother, and (3)
11 erred at steps four and five of the disability analysis. Dkt. 19-1 at 1. According to Plaintiff,
12 these errors should be remedied by remand for payment of benefits, or, in the alternative,
13 further proceedings. Dkt. 19-1 at 18. The Commissioner argues that the ALJ's decision has
14 no legal errors, is supported by substantial evidence and should be affirmed. Dkt. 22 at 16.

15 Medical Evidence

16 The ALJ is responsible for determining credibility and resolving ambiguities and
17 conflicts in the medical evidence. *See Reddick v. Chater*, 157 F.3d 715, 722 (9th Cir. 1998).
18 Where the medical evidence in the record is not conclusive, "questions of credibility and
19 resolution of conflicts" are solely the functions of the ALJ. *Sample*, 694 F.2d at 642. In such
20 cases, "the ALJ's conclusion must be upheld." *Morgan v. Commissioner of the Social Sec.*
21 *Admin.*, 169 F.3d 595, 601 (9th Cir. 1999). Determining whether inconsistencies in the
22 medical evidence "are material (or are in fact inconsistencies at all) and whether certain

01 factors are relevant to discount” the opinions of medical experts “falls within this
02 responsibility.” *Id.* at 603.

03 The ALJ must provide “clear and convincing” reasons for rejecting the uncontradicted
04 opinion of a treating or examining physician. *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir.
05 1996). Where, as here, a treating or examining physician’s opinion is contradicted, that
06 opinion “can only be rejected for specific and legitimate reasons that are supported by
07 substantial evidence in the record.” *Id.* at 830-31. Generally, a treating physician’s opinion is
08 given more weight “since these sources are likely to be the medical professionals most able to
09 provide a detailed, longitudinal picture of [a claimant’s] medical impairment(s).” 20 C.F.R. §
10 404.1527(c)(2). These opinions are given controlling weight if they are well supported by
11 diagnostic techniques and not inconsistent with the substantial evidence in the record. 20
12 C.F.R. § 404.1526(c)(2).

13 1. *Thomas Tocher, M.D.*

14 Plaintiff contests the ALJ’s rejection of the evidence provided by his treating
15 physician, Dr. Thomas Tocher. Dr. Tocher submitted a letter in December 2010 detailing
16 Plaintiff’s impairments. “Mr. Gates has chronic pain secondary to chronic low back
17 pain...He has continued residual left lower extremity pain and weakness. He should be
18 considered to have a failed laminectomy syndrome.” (AR 773.) Dr. Tocher then assessed
19 Plaintiff’s limitations including difficulty standing, walking or sitting for long periods of time;
20 he can stand/sit/walk approximately 30 minutes at any one time; during the course of a day
21 he can sit for two hours, stand for two hours, and walk for one hour; he cannot bend, squat,
22 kneel, crawl, or climb; he cannot work at unprotected heights or around moving machinery

01 due to poor balance; and he can occasionally lift/carry six to ten pounds. (AR 773.) Dr.
02 Tocher also provided an “estimate of physical capacities” with similar limitations. (AR 774.)
03 In rejecting Dr. Tocher’s opinion, the ALJ cited conclusory opinions that are unsupported or
04 contradicted by objective medical evidence. (AR 27-28.)

05 Dr. Tocher gave a brief description of Plaintiff’s back injury, pain level, and
06 medication, and then assessed severe limitations and opined that Plaintiff could not “engage
07 in substantial gainful employment on a continuous basis 8 hours a day 5 days a week.” (AR
08 773-74.) But, he provided no clinical findings or objective evidence to support his
09 conclusions. This lack of such support is a specific and legitimate reason to reject a
10 physician’s opinion. “[A]n ALJ need not accept the opinion of a doctor if that opinion is
11 brief, conclusory, and inadequately supported by clinical findings.” *Bayliss v. Barnhart*, 427
12 F.3d 1211, 1216 (9th Cir. 2005.) This holds true for a treating physician, such as Dr. Tocher,
13 whose opinion must be supported by diagnostic techniques to be given controlling weight. 20
14 C.F.R. § 404.1527(c)(2). Here, the record included no such diagnostic measures to
15 demonstrate Plaintiff’s limitations.

16 Additionally, the treatment notes from multiple office visits showed no objective
17 testing that would support the severe assessment. (AR 724-26, 783-85.) In fact, the notes
18 contradicted the severity of the limitations. The office notes described Plaintiff in “moderate
19 discomfort” or “no apparent distress.” (AR 724-26, 783-85). He walked with an antalgic gait
20 and a cane. (AR 724-26, 783-85). Physical exam revealed a healed laminectomy scar,
21 weakness in the lower left extremity, including hip flexors and knee extensors/flexors, and
22 absent left patella reflex.” (AR 725.) While Plaintiff “walks slowly and stiffly with a cane,”

nothing in Dr. Tocher's notes showed that Plaintiff experiences such discomfort that he can sit, stand, or walk for only 30 minutes at any one time, and only sit for two hours, stand for two hours, or walk for one hour during a full workday as assessed. (AR 773.) This discrepancy between a physician's opinion and clinical notes and observations "is a clear and convincing reason for not relying on the doctor's opinion." *Bayliss*, 427 F.3d at 1216.

Although Dr. Tocher was Plaintiff's treating physician, his severe assessment was conclusory and unsupported by clinical findings, as well as inconsistent with his clinical observations. The ALJ noted these failures, which provided specific and legitimate reasons for rejecting the opinion. The ALJ did not err by giving little weight to this opinion.²

2. *Don Schimmel, Ph.D.*

Dr. Don Schimmel provided five separate psychological assessments after evaluating Plaintiff in April 2008 (AR 380-91), February 2009 (AR 422-27) January 2010 (AR 604-15), December 2010 (AR 797-803), and December 2011 (AR 808-14). Dr. Schimmel consistently

² While the ALJ did not err in rejecting Dr. Tocher's opinion for the reasons cited, the Court must note the ALJ's inappropriate and unsupported attack on Dr. Tocher's medical judgment. The ALJ stated that "there is no predicate at all for Dr. Tocher's comment that the claimant cannot be exposed to any inhaled agents such as dust, fumes and gases. This calls into question either that he has poor medical judgment, or is functioning as an advocate. In any event, the functional assessment by Dr. Tocher is so exaggerated as to be non-credible on its face." (AR 27.) This severe criticism seemingly stems from the ALJ's misunderstanding of Dr. Tocher's assessment. In response to a form question as to whether Plaintiff needed restrictions on activities involving exposure, Dr. Tocher wrote, "none." (AR 774.) The ALJ apparently interpreted "none" to mean that Plaintiff could have no exposure. However, the Court interprets this "none" to mean that Plaintiff had no restrictions on exposure. Regardless of the interpretation, without evidence of actual impropriety an ALJ "may not assume that doctors routinely lie in order to help their patients collect disability benefits. *Lester*, 81 F.3d at 832. Additionally, ALJ Dethloff's rhetoric concerning Dr. Torcher's medical judgment is inflammatory and unnecessary.

01 assessed Plaintiff as markedly or severely impaired in several cognitive and social factors,
02 including ability to exercise judgment and make decisions, relate appropriately to co-workers
03 and supervisors, and tolerate the pressures and expectations of a normal work setting. (AR
04 382, 424 611, 800, 809.) In December 2010, Dr. Schimmel opined that Plaintiff's medication
05 seemed be helping and he appeared to be more stable. (AR 800.) But, Dr. Schimmel also
06 found, "[w]hile he once managed a restaurant, at this time he seems only able to manage a
07 simple daily routine." (AR 800.)

08 The ALJ rejected Dr. Schimmel's assessments. "Dr. Schimmel's reports are carefully
09 considered, because they could represent a longitudinal picture of the claimant's functioning.
10 However, I do not find them persuasive." (AR 30.) The ALJ rejected Dr. Schimmel's
11 opinions because "he seems to have based his opinions largely on the claimant's subjective
12 reports." (AR 30.) Additionally, the ALJ noted that the marked and severe ratings are
13 inconsistent with the results of various mental status examinations that show "mostly intact
14 functioning." (AR 30.)

15 As noted above, this discrepancy between a physician's opinion and clinical notes and
16 observations "is a clear and convincing reason for not relying on the doctor's opinion."
17 *Bayliss*, 427 F.3d at 1216. Here, the mental status examination results belie the marked and
18 severe psychological ratings. For example, in December 2010, Plaintiff performed serial 7's,
19 followed a three step command, and showed intact insight, judgment, and thinking. (AR 802-
20 03.) At that time, he could remember three objects immediately, two after five minute delay,
21 and two after a ten minute delay, as well as repeat seven digits forward and six digits
22 backward. (AR 803.) Despite this performance, Dr. Schimmel opined that Plaintiff's

01 “concentration and memory appear uneven” and rated his ability to learn new tasks and
02 perform routine tasks without undue supervision as markedly impaired. (AR 800.)

03 Similarly, in February 2009, Plaintiff could follow a three step command and
04 remember three objects immediately and after delays of five and ten minutes. (AR 426-27.)
05 Dr. Schimmel opined that Plaintiff’s cognitive factors were “likely affected by anxiety—but
06 not evidenced in this eval.” (AR 424.) Despite the lack of evidence, Dr. Schimmel rated
07 Plaintiff as markedly impaired in his ability to learn new tasks and follow complex
08 instructions, and severely impaired in his ability to perform routine tasks. (AR 424.)

09 As shown by these examples, the mental status examination results in the record do
10 not support Dr. Schimmel’s assessments. While Plaintiff undoubtedly suffers from
11 impairments in his social and cognitive functioning as a result of his mental condition, the
12 mental status exam results were not consistent with the marked and severe ratings assigned by
13 Dr. Schimmel. The ALJ properly considered these discrepancies and did not err by giving the
14 opinions little weight.

15 Lay Evidence

16 Plaintiff’s mother, Sandra Proffitt, gave testimony and provided a written third party
17 function report concerning her son’s impairments. (AR 26-79, 112-18, 317-24.) Descriptions
18 by friends and family members in a position to observe a claimant’s symptoms and daily
19 activities have routinely been treated as competent evidence.” *Sprague v. Bowen*, 812 F.2d
20 1226, 1232 (9th Cir. 1987). A germane reason is required to reject such evidence. *Dodrill v.*
21 *Shalala*, 12 F.3d 915, 918-19 (9th Cir. 1993).

22 Ms. Proffitt reported that Plaintiff could not do housework (AR 72), and confined

01 himself in his bedroom where he spent most of the day sitting or lying down. (AR 115.) She
02 witnessed his pain and frequent falls. (AR 72, 115.) He was depressed and confused,
03 needing frequent reminders to shower, go to appointments, and take the proper dosage of his
04 medicine. (AR 112-16, 319, 321.) The ALJ dismissed Ms. Proffitt's evidence due to
05 inconsistency with the medical evidence and the appearance that "the claimant is amassing
06 considerable benefit from the behavior that his mother observes." (AR 32.) Additionally, the
07 ALJ stated that he discounted Ms. Proffitt's evidence for the same reasons he found Plaintiff's
08 testimony not credible. (AR 32.)

09 Regardless of the validity of the ALJ's reasoning as to the specifics for rejecting Ms.
10 Proffitt's evidence, the Court must affirm the ALJ's treatment of this lay witness.³ "Where
11 the ALJ rejects a witness's testimony without providing germane reasons, but has already
12 provided germane reasons for rejecting similar testimony, we cannot reverse the agency
13 merely because the ALJ did not 'clearly link his determination to those reasons.'" *Molina v.*
14 *Astrue*, 674 F.3d 1104, 1121-2 (9th Cir. 2012) (internal citation omitted). In this case, Ms.
15 Proffitt's evidence reiterated Plaintiff's testimony about the severity of his pain, physical
16 limitations, and mental impairments. The ALJ found Plaintiff's statements concerning his
17 impairments lacking in credibility. (AR 31-34.) Plaintiff does not contest this finding. Dkt.
18 19-1 at 1. Because Plaintiff does not challenge the credibility determination, the ALJ's
19 reasons for discrediting Plaintiff's statements about the severity of his impairments are
20 legitimate and also support the rejection of Ms. Proffitt's evidence covering the same

21 _____
22 ³ The Court notes that ALJ Dethloff's finding that Plaintiff "is amassing considerable benefit from the behavior that his mother observes" is unsupported by the record. There is no evidence of malingering or secondary gain motivation.

01 symptoms. Therefore, the ALJ provided a germane reason for rejecting this lay witness
02 evidence. There is no error.

03 Steps Four and Five

04 Finally, Plaintiff asserts that the ALJ improperly determined that he could return to his
05 past relevant work or perform the cited representative occupations at step five. Dkt. 19-1 at
06 17. Because Plaintiff fails to argue this assignment of error with any specificity, the Court
07 will not consider the issue. *Carmickle v. Comm'r of Soc. Sec. Admin.*, 533 F.3d 1155, 1161
08 n.2 (9th Cir. 2008). Furthermore, these claims are merely a restatement of the previously
09 addressed arguments concerning the properly discounted evidence. As a result, no error is
10 established. *See Stubbs-Danielson v. Astrue*, 539 F.3d 1169, 1175-6 (9th Cir. 2008).

11 CONCLUSION

12 For the reasons set forth above, this matter is AFFIRMED.

13 DATED this 8th day of September, 2015.

14
15 

16 The Honorable Richard A. Jones
17 United States District Judge
18
19
20
21
22